Hong Teng Yong v Khaw Kim Seng & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–176 OF 2004
CHOONG SIEW KHIM JC
21 MAY 2010

Tort — Negligence — Damages — Cross-appeal on quantum against award on medical expenses — Whether first respondent entitled to seek treatment at private hospital — Whether trial judge erred in awarding first respondent one-third of private medical bill for medical expenses

Tort — Negligence — Road accident — Apportionment of liability — Appellant found 100% liable for accident — Whether trial judge erred in finding appellant wholly liable for accident — Whether there was material discrepancy in testimonies of respondents and eyewitness — Whether eyewitness independent witness with no interest

On 12 March 1998 at about 9.30am while the first respondent riding a motorcycle, and Chen Fun Tet ('the second respondent'), driving a car, were travelling along Jalan Ghazali, the driver of car ADH 2102, who was travelling from the opposite direction suddenly encroached onto their right of way. This encroachment forced the second respondent to evasively swerve to his left and collide with the first respondent. The second respondent commenced an action against the second respondent and Hong Teng Yong, the owner of car ADH 2102 for causing the accident and sought damages against both parties. At the trial, both respondents testified that car ADH2101 overtook another car when it encroached onto their path thereby causing the accident. Their version of how the accident occurred was also corroborated by another witness (the eyewitness), who was driving behind car ADH 2102 at the material time. According to the eyewitness ADH 2102 'drifted' over to the opposite lane, which resulted in the collision between the two respondents. There was no evidence to suggest that the interested party was an interested party to the suit. The sessions court judge hearing this case found Hong Teng Yong, the owner of car ADH 2102 ('the appellant') wholly liable for causing the accident and awarded damages to the first respondent in the sum of RM19,474.34, being one-third of his private medical bill. This was the appellant's appeal against that decision on the grounds that the sessions court judge had erred in her findings that the appellant was 100% liable for the accident. The appellant submitted that there was a material contradiction arising from the testimony of the respondents and the eyewitness, in that the respondents testified that the appellant's car overtook another car when it encroached onto their path

whereas the eyewitness said that the appellant's car drifted onto the other side of the road and it was not overtaking the other car. The first respondent had cross-appealed on quantum against the award on medical expenses allowed. The first respondent contended that the full amount of the medical bill ought to have been allowed. The issues involved in this case were whether the trial judge had erred in finding the appellant wholly liable for the accident and whether the first respondent was entitled to seek treatment at a private hospital and whether the amount of RM19,474.34 allowed was unreasonable in the circumstances of this case.

Held, dismissing the appeal and the cross-appeal with costs:

(1) The apparent discrepancy in the testimonies of the respondents and the eyewitness should not detract from the stark and indisputable fact that ultimately it was the appellant's vehicle that had consequently infringed on the wrong side of the road against the flow of oncoming vehicles that immediately precipitated the accident. Further, from a perusal of the notes of evidence it was found that the appellant had failed to rebut or contradict this material fact when the respondents and eyewitness were cross-examined (see paras 3–4).

(2) The eyewitness was an entirely independent witness who had no interest in the success or failure of the case and as such there was no reason to dispute that the car registration No ADH 2102 was correctly noted and given to the second respondent who had subsequently used it in his police report lodged about an hour after the accident (see paras 6–7).

(3) The fact that there was no contact between the appellant's car and the second respondent's car was irrelevant in the circumstances of this case. Based on the evidence, it was inherently probable that the accident happened according to the version of the respondents. As such the trial judge had not erred in her findings (see paras 8–9).

(4) From the evidence it was clear that the first respondent was not justified to seek treatment from a private hospital. Convenience per se cannot amount to a ground to justify treatment at a private hospital as a matter of right and choice. Nevertheless based on the peculiarity of the case that the first respondent was still under treatment by a doctor from the private hospital that he had chosen to be admitted at for the same fracture from which he had not fully recovered, the first respondent could choose to be admitted to the private hospital instead of a government hospital, in which that same treatment was also available. However, this choice was subject to the caveat against full entitlement of the claim for medical expenses. Thus the trial judge had not erred in awarding one-third of this head of claim (see para 16).

[Bahasa Malaysia summary

Pada 12 Mac 1998 pada kira-kira 9.30 pagi ketika responden pertama yang menunggang motosikal dan Chen Fun Tet ('responden kedua') yang memandu kereta, memandu sepanjang Jalan Ghazali, pemandu kereta ADH 2102 yang sedang memandu dari arah bertentangan tiba-tiba merempuh masuk hak lalu lalangnya. Rempuhan tersebut memaksa responden kedua membelok dengan tiba-tiba untuk mengelak ke arah kirinya dan bertembung dengan responden pertama. Responden kedua memulakan tindakan terhadap responden kedua dan Hong Teng Yong, pemilik kereta ADH 2102 kerana menyebabkan kemalangan tersebut dan memohon ganti rugi terhadap kedua-dua pihak. Semasa perbicaraan, kedua-dua responden memberi keterangan bahawa kereta ADH 2101 sedang memotong kereta lain apabila dia merempuh masuk ke laluan mereka justeru mengakibatkan kemalangan. Versi mereka bagaimana kemalangan tersebut berlaku juga disokong oleh saksi lain, yang sedang memandu di belakang kereta ADH 2102 pada masa material. Menurut saksi ADH 2102 'melayang' ke arah lorong yang bertentangan yang mana mengakibatkan perlanggaran antara kedua-dua responden. Tiada keterangan mencadangkan bahawa pihak yang berkepentingan merupakan pihak yang berkepentingan kepada guaman tersebut. Hakim mahkamah sesyen yang mendengar kes ini mendapati Hong Teng Yong, pemilik kereta ADH 2102 ('perayu') bertanggungan sepenuhnya mengakibatkan kemalangan dan mengawardkan ganti rugi kepada responden pertama sejumlah RM19,474.34, iaitu sebanyak satu pertiga daripada bil perubatan persendiriannya. Ini merupakan rayuan perayu terhadap keputusan tersebut atas dasar bahawa hakim mahkamah sesyen telah khilaf dalam keputusan beliau bahawa perayu bertanggungan 100% terhadap kemalangan tersebut. Perayu menghujah bahawa percanggahan material berbangkit daripada keterangan responden-responden dan saksi, yang mana responden-responden memberi keterangan bahawa kereta perayu memotong kereta lain apabila kereta itu merempuh ke laluan mereka tetapi saksi pula menyatakan bahawa kereta perayu melayang ke arah lorong yang bertentangan dan kereta tersebut tidak memotong kereta lain. Responden pertama telah merayu balas terhadap kuantum award perbelanjaan perubatan yang dibenarkan. Responden pertama menghujah bahawa jumlah penuh bil perubatan harus dibenarkan. Isu-isu yang terlibat dalam kes ini ialah sama ada hakim bicara telah khilaf dalam memutuskan perayu bertanggungan sepenuhnya atas kemalangan tersebut dan sama ada responden pertama berhak memohon rawatan di hospital swasta dan sama ada jumlah RM19,474.34 yang telah dibenarkan adalah tidak wajar dalam keadaan kes ini.

Diputuskan, menolak rayuan dan rayuan balas dengan kos:

(1) Kecacatan yang jelas dalam keterangan-keterangan responden-responden dan saksi tidak harus menjejaskan fakta sebenar dan tak boleh sangkal bahawa pada dasarnya kenderaan perayu yang

merempuh ke lorong jalan yang salah menentang arah trafik yang mempercepatkan kemalangan tersebut. Selanjutnya, daripada penelitian nota-nota keterangan adalah didapati bahawa perayu gagal mematahkan atau menyanggah fakta material ini apabila responden-responden dan saksi diperiksa balas (lihat perenggan 3–4).

(2) Saksi tersebut adalah saksi bebas yang tiada kepentingan dalam berjaya atau gagalnya kes tersebut dan oleh itu tiada alasan untuk mempertikaikan bahawa kereta bernombor berdaftar ADH 2102 dicatat dengan betul dan diberikan kepada responden kedua yang kemudian menggunakannya dalam laporan polisnya sejam selepas kemalangan (lihat perenggan 6–7).

(3) Fakta bahawa tiada perlanggaran antara kereta perayu dan kereta responden kedua tidak relevan dalam keadaan kes ini. Berdasarkan keterangan, adalah berkemungkinan bahawa kemalangan tersebut berlaku seperti versi responden-responden. Oleh itu, hakim bicara tidak khilaf dalam penemuan beliau (lihat perenggan 8–9).

(4) Daripada keterangan adalah jelas bahawa responden pertama tidak wajar mendapatkan rawatan di hospital swasta. Kesenangan semata-mata tidak mewajarkan rawatan di hospital swasta sebagai hak dan pilihan. Namun begitu, berdasarkan ciri khusus kes ini iaitu responden pertama masih dalam rawatan oleh doktor dari hospital kerajaan yang mana dia memilih untuk tinggal di wad hospital tersebut bagi keretakan yang sama yang dia belum sembuh sepenuhnya, responden pertama boleh memilih untuk pergi ke hospital swasta berbanding hospital kerajaan, yang mana rawatan yang sama juga boleh diberikan. Tetapi, pilihan ini tertakluk kepada kaveat terhadap hak mendapat tuntutan perbelanjaan perubatan sepenuhnya. Maka, hakim bicara tidak khilaf dalam mengawardkan satu pertiga bagi tuntutan ini (lihat perenggan 16).]

Notes

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 936–950.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1258–1500.

Cases referred to

Chai Yee Chong v Lew Thai [2004] 2 MLJ 465; [2004] 2 CLJ 321, CA (refd)

Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor [1988] 1 MLJ 19; [1987] 2 CLJ 420; [1987] CLJ (Rep) 275, SC (refd)

Tan Kia Bak v Mooi King Meng & Anor (Supreme Court Civil Appeal No 249 of 1987 (refd)

M Karunananthan (Shamini, Karu & Leong) for the appellant.
Harban Singh (Gurdev, Dalgit, Su & Co) for the first respondent.

Kiren Kaur (Loh & Assoc) for the second respondent.

Choong Siew Khim JC:

[1] This is an appeal from the judgment of Pn Rasidah bt Hj Chik the learned sessions court judge who found the appellant (the second defendant) wholly liable for causing the accident between car WQ 787 driven by the second respondent (the first defendant) and motorcycle ACS 4891 ridden by the first respondent (the plaintiff). The appellant is the personal representative of Hong Teng Yong, the owner of car ADH 2102. The first respondent has cross-appealed on quantum against the award on medical expenses of which only 1/3 was allowed.

[2] The sessions judge clearly came to her finding on liability based on the facts, evidence and circumstances surrounding the case that on 12 March 1998 at about 9.30am when the two respondents were travelling along Jalan Ghazali Jawi from the direction of the Sports Complex roundabout (see sketch plan P1), the driver of car ADH 2102 who was travelling from the opposite direction suddenly encroached on to their right of way thus forcing the second respondent to evasively swerve to his left. This action caused him to collide with the first respondent. She found the testimony of the two respondents to be the same pertaining to how the accident happened. Their version was corroborated by witness SD2 who was driving behind car ADH 2102 when she witnessed how this car 'drifted' over to the opposite lane that resulted in the collision between the two respondents.

[3] It was the argument of learned counsel for the appellant that there was a material contradiction arising from the testimony of the respondents that was erroneously considered by the trial judge to be otherwise. The two respondents testified that car ADH 2102 overtook another car when encroaching their path while SD2 said that 'the car was actually drifting to the other side of the road and not overtaking the other car'. That suggested their testimony was at odds and not sufficiently credible but the trial judge mentioned in her grounds that this was not a material contradiction. In this appeal, I am however inclined to agree with the respondents that this apparent discrepancy should not detract from the stark and indisputable fact that ultimately it was vehicle ADH 2102 that had consequently infringed on the wrong side of the road against the flow of oncoming vehicles that immediately precipitated the accident. There was no doubt that the trial judge was convinced the appellant's car had veered from its right of way.

[4] It ought to be noted from a perusal of the notes of evidence that in this connection the appellant had failed to rebut or contradict this material fact when the respondents and SD2 were cross-examined. It was also not expressly

put to them that the appellant's car did not cause or was not involved in the accident at all in the way described by them in court.

[5] SD2 was an eye-witness who was called by the second respondent. The essence of her evidence was that after vehicle ADH 2102 was inexplicably driven on to the other side of the road, she saw the oncoming car of the second respondent swerve to its left on to the grass to avoid it and in the process hit the motorcycle which was also on the left. Since she was driving she told her son to take down the registration number of the encroaching car.

[6] At the scene of accident she subsequently gave her name, contact number and the car registration number to the second respondent who was invited to contact her if she was required as his witness. There was no evidence to suggest that SD2 was an interested party to the suit. Neither was she known or related to any party. There was hence no sustainable reason for her to concoct a story favorable to the second respondent in particular. The appellant's submission that SD2's evidence was inadmissible hearsay evidence on the basis that her son who took down the number was not called, with due respect, does not hold water as SD2 saw how the accident happened with her very own eyes and she merely relied on her son to take down the car registration number as she was driving. There was no reason to dispute that SD2 was an entirely independent witness who had no interest in the success or failure of the case. In fact her impartiality was never seriously challenged by the appellant at the trial.

[7] As stated earlier, the appellant inadvertently failed to challenge the second respondent's claim that ADH 2102 was the vehicle directly involved in the accident. Furthermore, the trial judge had heard, seen and observed SD2's demeanour and accepted her evidence as credible without issue that the registration No ADH 2102 was correctly noted and given to the second respondent who went on to mention it in his police report lodged about an hour after the accident. The evidence also shows that the second respondent was not even specifically challenged that he took evasive action when the oncoming car encroached his right of way.

[8] Based on such irrefutable evidence, it was inherently probable that the accident happened according to the version of the respondents. That there was no contact between vehicles ADH 2102 and WQ 787 is irrelevant in the circumstances of the case. Vehicle ADH 2102 had directly caused the accident by encroaching the opposite lane. I only wish to comment that the investigating officer's (SP1) investigation was lackadaisical and the adjuster's evidence (SD3) and his report was based on a biased and preconceived conclusion.

[9] I find that the sessions court judge had judiciously considered and evaluated the entire evidence adduced in its totality before finding the appellant 100% liable and she had not erred in the manner and on the grounds argued by learned counsel for the appellant. As such, the appeal against liability is dismissed with costs.

[10] Going on to the cross-appeal by the first respondent who was awarded 1/3 of his private medical bill of RM19,474.34, it was contended that the full amount ought to be allowed for these reasons:

(a) The first respondent was taken directly to Hospital Fatimah by the second respondent. His counsel overlooked to mention that it was at his own request that he wanted to be taken to Hospital Fatimah (see p 40 of the appeal record);

(b) He had a reason though for making this choice. Prior to the accident, he was still under the treatment of Dr Siva of Hospital Fatimah following an accident in April 1997 in Singapore where he had worked before. Coincidentally he was on his way home from Hospital Fatimah that morning when the accident happened. It was submitted thus that it was reasonable to seek treatment from Dr Siva who knew and had his medical history/record.

[11] From my reading and understanding of the notes of evidence, it was not totally clear on this point but it would seem to suggest and infer that the medical bill was apparently agreed by all the parties subject to submissions (see pp 34–35 of the appeal record with cross-reference to p 38 of same). Nothing was touched on whether the amount of RM19,474.34 that was incurred was unreasonable on this premise. No one questioned that this amount was unreasonable or on the high side although as a matter of principle, the amount incurred must be reasonable. That being the case and nevertheless, the appeal must be confined to whether the said amount or an amount invariably less should be allowed in considering whether the first respondent was entitled to seek treatment at Hospital Fatimah.

[12] In *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465; [2004] 2 CLJ 321, Abdul Hamid Mohamad FCJ (as he then was) inimitably ran through the whole gamut of authorities regarding the right to get treatment at a private hospital with one school of thought in favour of allowing full expenses incurred at private hospitals while the other school was not amenable towards allowing the claim at all or where only part of the claim was allowed. As to the second line of thought, the Supreme Court in *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19; [1987] 2 CLJ 420; [1987] CLJ (REP) 275 (SC) did not allow medical expenses at a private hospital because the treatment was available at a government hospital while the same court in

Tan Kia Bak v Mooi King Meng & Anor (Supreme Court Civil Appeal No 249 of 1987, unreported) allowed only 1/3 the amount claimed because the plaintiff transferred himself to a private hospital on his own accord. The common trend has since been to follow *Tan Kia Bak* by awarding 1/3.

[13] The majority of those cases involved initial admission to government hospitals before subsequent discharge and admission to private hospitals. Nonetheless it is clear that a claimant is not entitled to medical expenses expended in a private hospital of his choice as a matter of right. If he seeks treatment at a private hospital, he has to prove the following as held in *Chai Yee Chong v Lew Thai*:

(a) That the particular treatment required is not available at the government hospital due to the unavailability of necessary equipment or qualified doctors or other sufficient reasons;

(b) Though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; and

(c) That the treatment at the government hospital though available is grossly inadequate.

[14] The sessions court judge allowed 1/3 of the medical expenses because she held that the appellant did not comply with the three guidelines just stated. The instant case I would say is unique on its own facts as the appellant chose to go to Hospital Fatimah because he was treated there for injuries suffered from an earlier accident almost a year ago. He was on follow-up by Dr Siva at this hospital. Yes, Dr Siva had his medical records but did this alone entitle him to straightaway seek treatment before the same hospital as a matter of right?

[15] This was not a case where the accident victim was first admitted to a government hospital and subsequently got himself discharged for treatment at a private hospital for whatever reason. It would seem to more convenient and straightforward for the first respondent to seek treatment at Hospital Fatimah due to the fact that he was not completely recovered from the first accident. The first respondent said his recovery was 70% at the time of the second accident (see p 33 of the appeal record). This however did not deter him from riding a motorcycle. He suffered a re-fracture to the intercondyle and supracondyle of the right femur.

[16] On the other hand, it should not be overlooked that the first respondent was absolutely presumptuous or even careless when from the evidence he did not even bother to proffer proof of any of the three pre-conditions and on this score it ought to be held he was not justified to seek treatment at Hospital

Fatimah. Convenience per se cannot amount to a ground to justify treatment at a private hospital as a matter of right and choice. Nevertheless based on the peculiarity of the case that he was still under treatment by Dr Siva from the said hospital for the same fracture from which he had apparently not fully recovered, the first respondent could choose to be admitted to Hospital Fatimah instead of the Ipoh General Hospital but in my opinion, this choice is still subject to the caveat against full entitlement of the claim for medical expenses. The difference is that he was not entirely entitled to be treated privately when there was no proof in the first place that the same treatment was not available at the Ipoh General Hospital for the particular fracture suffered by the first respondent. There was also no evidence of complications arising from the re-fracture that it had to be treated at Hospital Fatimah and nowhere else. As such he could not incur substantial private medical costs and expect to be fully reimbursed. I therefore hold that the sessions court judge had not erred in awarding 1/3 of this head of claim. The cross-appeal is hence dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Reported by Kohila Nesan